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IN THE

Supreme Court of the United States

October Term, 1966

NO._____

GEORGE H. GREENE, JR., *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

ON APPEAL FROM THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

To: *The Honorable Supreme Court Of The United States Of America:*

JURISDICTIONAL STATEMENT

George H. Greene, Jr., Appellant herein, appeals from the final judgment of the Court of Criminal Appeals of the State of Texas in overruling Appellant's Motion for Rehearing, without written opinion, entered on the 12th day of October, A. D., 1966, wherein said Court affirmed the judg-

ment of the County Criminal Court at Law No. 2 of Harris County, Texas, remanding Appellant to the custody of Herman B. Short, Chief of Police, City of Houston, Texas.

OPINIONS BELOW

The opinions below appear:

Opinion of the Court of Criminal Appeals of the State of Texas, entitled Ex Parte George H. Greene, Jr., reported in 406 S.W.2d 465, and is appended hereto as Appendix "A", page 7.

Judgment of the Court of Criminal Appeals of the State of Texas, rendered and entered on the 12th day of October, A. D., 1966, wherein Appellant's Motion For Rehearing was overruled without written opinion, and is appended hereto as Appendix "B", page 9.

JURISDICTION

Appellant's Motion For Rehearing was overruled on the 12th day of October, A. D., 1966, at which time the judgment of the Court of Criminal Appeals of the State of Texas was entered and became effective, and is appended hereto as Appendix "B", page 9. Notice of Appeal was filed in that Court on the 28th day of December, A. D., 1966. (Record, page 66-67.) The Court of Criminal Appeals of the State of Texas is not an intermediate court. It is the Court of last resort in all matters within its jurisdiction in the State of Texas, its judgments are not reviewed by the Supreme Court of the State of Texas, or by any other Texas Court.

The jurisdiction of this Court is invoked under Title 28, U.S.C.A., Section 1257 (2). *Mishkin v. State of New York,*

86 S.Ct. 958, 383 U.S. 502. Appellant, by Habeas Corpus proceeding, contended that his arrest and subsequent confinement and restraint on a warrant of arrest (Record, page 14), issued on a complaint (Record, page 13), drawn to conform to Article 15.05 V.A.C.C.P., Appendix "C", page 10, based on information and belief of the affiant, with no allegation of personal knowledge or probable cause, was illegal and in violation of and repugnant to the Fourth Amendment and the Fourteenth Amendment to the Constitution of the United States of America.

QUESTION PRESENTED

Whether the Court of Criminal Appeals of the State of Texas erred in failing to hold Article 15.05 (2) V.A.C.C.P., Appendix "C", page 10, repugnant to the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States of America, or either of them, in that said statute, as a requisite, allows the filing of a complaint, which was the basis for the issuance of the warrant of arrest herein (Record, page 14), based solely on information and belief of the affiant thereto, and without allegations of personal knowledge or probable cause that an offense was committed and if an offense was committed, that it was committed by Appellant?

STATUTES INVOLVED

The pertinent statute, Article 15.05, *Texas Code of Criminal Procedure*, is appended hereto as Appendix "C", page 10.

STATEMENT

On the 1st day of December, A. D., 1965, Appellant was cited for the offense of speeding 45 miles per hour in a

35 mile per hour zone, in the City of Houston, Harris County, Texas. On the 16th day of December, A. D., 1965, a complaint (Record, page 13) was filed in the Corporation Court of the City of Houston, Harris County, Texas, charging Appellant with the offense of speeding as aforesaid, this complaint was the basis for a warrant of arrest (Record, page 14) of Appellant being issued on the 22nd day of March, A. D., 1966. This warrant of arrest was executed on the day of its issuance, by arresting Appellant and placing him in the custody of the Chief of Police of the City of Houston, Harris County, Texas, in the jail of said City. From this restraint and confinement, Appellant made application for a Writ of Habeas Corpus (Record, pages 2, 3 and 4) to the County Criminal Court at Law No. 2 of Harris County, Texas, and as grounds for said Writ alleged the unconstitutionality of the warrant of arrest (Record, page 14) and the complaint (Record, page 13) and that Appellant's rights guaranteed to him by the Fourth and Fourteenth Amendments to the Constitution of the United States of America were violated.

The Writ of Habeas Corpus prayed for by Appellant was granted (Record, page 8) and after hearing, the relief sought by Appellant was denied (Record, page 17), he was ordered remanded to the custody of the said Chief of Police of said City, and no new commitment was ordered issued by the Court, from this judgment Appellant appealed to the Court of Criminal Appeals of the State of Texas.

The Court of Criminal Appeals of the State of Texas affirmed the judgment of the trial Court (Appendix "A", page 7) and subsequently overruled Appellant's Motion For Rehearing without written opinion (Appendix "B").

THE QUESTION IS SUBSTANTIAL

The question raised in this appeal is substantial, the question is of great public interest and applies to every person arrested by virtue of a warrant of arrest, be it for a lowly traffic violation or for the purported commission of an infamous felony. Must a person so arrested be subjected to a search of his person, as is out of common sense always done prior to placing him in confinement in jail, when the fruits of such search would not be admissible, should the fruits be contraband, and the warrant was not based on a complaint that set out probable cause or personal knowledge? *Giordenello v. United States*, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503, and *Barnes v. State of Texas*, 380 U.S. 253, 85 S.Ct. 942, 13 L.Ed.2d 818. Should a conscientious, dedicated law enforcement officer be forced to look beyond the process in hand to feel secure in the execution of a warrant of arrest and the search incident to such execution, or should such officer be forced to look further into some obscure magistrate's office, a great distance away, to determine if he is holding a valid warrant of arrest, that has as its basis a complaint with allegations of personal knowledge or probable cause and not information and belief of the affiant, as the statute, Article 15.05 Code of Criminal Procedure, permits?

It is submitted that the decision of the Court of Criminal Appeals of the State of Texas should be reversed and that the warrant of arrest under which Appellant is presently restrained should be declared by this honorable Court to be illegal and void and Appellant granted all the relief he has been heretofore denied. We believe that the question

presented by this appeal is substantial and that it is of great public importance.

Respectfully submitted.

BUCK C. MILLER
407 Scanlan Building
405 Main Street
Houston, Texas 77002

Of Counsel:

W. C. WIEBUSCH
409 Scanlan Building
405 Main Street
Houston, Texas 77002

I, Buck C. Miller, attorney for Appellant, hereby certify that on this the 23rd day of March, A. D., 1967, I served a copy of this Jurisdictional Statement on Crawford Martin, Attorney General of the State of Texas, Austin, Texas, by depositing same in the United States Post Office, with first class postage prepaid, addressed to the said Crawford Martin at Box "R", Capitol Station, Austin, Texas 78711.

BUCK C. MILLER
Attorney for Appellant

APPENDIX "A"

Ex Parte No. 39,658

George H. Greene, Jr. - - - - Appeal from Harris County

OPINION

This is an appeal from an order in a habeas corpus proceeding in which appellant was remanded to the custody of the Chief of Police of the City of Houston.

The avowed purpose of this proceeding is to test the sufficiency of the complaint upon which appellant has not yet been tried and to test the form of the bail bonds required by the City of Houston.

In Ex Parte Jarvis, 3 S.W.2d 84, Judge Hawkins speaking for the Court said:

> "In the present case the effort is to have this court declare in a habeas corpus proceeding that a particular information fails to charge the violation of a law, the existence of which is not questioned.
>
> Whatever may be the rule in other jurisdictions it seems to be the settled policy in this state not to permit resort to habeas corpus proceedings primarily for the purpose of testing the sufficiency of a complaint or indictment in advance of a trial in the lower courts."

Later in Ex Parte Drenner, 67 S.W.2d 870, this Court said:

> "This court is not a jury, nor is it a nisi prius court. Every question that is here presented could and should be first presented to a trial court upon the support of competent testimony, and from the decision of such trial court, if unsatisfactory, an appeal could be had

to this court, which could then pass upon the law and the testimony heard by the trial court."

See also Article 11.45, V.A.C.C.P.

The judgment remanding appellant is affirmed.

Morrison, Judge

(Delivered June 8, 1966)

APPENDIX "B"

TRIAL COURT NO. 212,965

THE STATE OF TEXAS,

TO THE COUNTY CRIMINAL COURT AT LAW NO. 2 OF HARRIS COUNTY—GREETING:

Before our COURT OF CRIMINAL APPEALS, on the 12th day of October, A.D. 1966, the cause upon appeal to revise or reverse your Judgment between Ex Parte George H. Greene, Jr., Appellant, No. 39,658 vs. The State of Texas, Appellee, was determined; and therein our said COURT OF CRIMINAL APPEALS made it order in these words:

"This cause came on to be heard on the transcript of the record of the Court below, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance." APPELLANT'S MOTION FOR REHEARING OVERRULED WITHOUT WRITTEN OPINION:

WHEREFORE, We command you to observe the order of our said COURT OF CRIMINAL APPEALS in this behalf and in all things to have it duly recognized, obeyed and executed.

WITNESS, the HON. W. A. MORRISON, Presiding Judge of our said COURT OF CRIMINAL APPEALS, with the Seal thereof annexed, at the City of Austin, this 14th day of October, A.D. 1966.

(Seal)

Glenn Haynes, Clerk.

APPENDIX "C"

Article 15.05 Texas Code of Criminal Procedure

The complaint shall be sufficient, without regard to form, if it have these substantial requisites:

1. It must state the name of the accused, if known, and if not known, must give some reasonably definite description of him.

2. It must show that the accused has committed some offense against the laws of the State, either directly or that the affiant has good reason to believe, and does believe, that the accused has committed such offense.

3. It must state the time and place of the offense, as definitely as can be done by the affiant.

4. It must be signed by the affiant by writing his name or affixing his mark.

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JOHN F. DAVIS, CLERK

NO. 1199

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

GEORGE H. GREENE,

Appellant

vs.

THE STATE OF TEXAS,

Appellee

MOTION TO DISMISS OR AFFIRM

CRAWFORD C. MARTIN
Attorney General of Texas
GEORGE M. COWDEN
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NO. —

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

GEORGE H. GREENE,

Appellant

vs.

THE STATE OF TEXAS,

Appellee

MOTION TO DISMISS OR AFFIRM

Appellee, The State of Texas, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the above cause be dismissed on the ground that the appeal is not within the jurisdiction of this Court because it is not taken in conformity with the statutes and rules governing appeals to this Court and does not present a substantial federal question, or, in the alternative, Appellee moves that the judgment of the Court below be affirmed.

STATEMENT

This is an appeal from a final judgment of the Texas Court of Criminal Appeals, the highest court in Texas that considers criminal cases and habeas corpus cases arising out of criminal proceedings.

On December 1, 1965, Appellant was stopped for the offense of speeding and issued a summons to appear by the arresting officer. Later, a complaint was filed

by a city employee before a deputy clerk of the Corporation Court of the City of Houston, the complainant using the arresting officer's traffic ticket as a basis for the facts alleged.

Appellant failed to appear pursuant to the summons and a warrant for his arrest was issued based upon the complaint previously filed.

Appellant voluntarily surrendered to the authorities. He then made bond and petitioned for a writ of habeas corpus on the ground that the warrant for his arrest was invalid as not being issued on probable cause. He appealed the denial of the writ of habeas corpus to the Texas Court of Criminal Appeals which Court affirmed the judgment of the lower court. (See Appendix "A" to Appellant's Jurisdictional Statement.) The Court of Criminal Appeals denied Appellant's Motion for Rehearing (Appellant's Jurisdictional Statement, Appendix "B"), and Appellant now attempts to review the proceedings below in this Court by Appeal.

ARGUMENT

While there may be some question as to the validity of the complaint and the subsequent warrant of arrest (because of an inadequate showing of probable cause in the complaint), this question does not form the basis for an Appeal to this Court.

An appeal from the final judgment of a state court is governed by Section 1257, Title 28, United States Code, which statute reads as follows:

> §1257. State courts; appeal; certiorari
>
> "Final judgments or decrees rendered by the highest court of a State in which a decision could

be had, may be reviewed by the Supreme Court as follows:

"(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

There is no question in this case concerning the validity of a treaty or statute of the United States. Nor is there any issue presented here that a statute of the State of Texas is repugnant to the Constitution, treaties or laws of the United States.

Appellant attempts to draw in question the validity of Article 15.05 of the Texas Code of Criminal Procedure which is reproduced in Appendix "C" of the Appellant's Jurisdictional Statement, Appellant suggesting that, since there is no requirement specifically set out requiring probable cause for the filing of a complaint, the statute violates the due process requirement of the Constitution of the United States.

However, it should be observed that probable cause

must be stated in a complaint in order for a warrant of arrest properly to issue. See *Barnes v. Texas,* 380 U.S. 253 (1965). This requirement is recognized by the courts of Texas as is indicated by the commentaries following Article 15.05 in Vernon's Annotated Code of Criminal Procedure. The comments are by W. A. Morrison, a judge of the Texas Court of Criminal Appeals, now and at the time his commentary was written, and John F. Onion, Jr., a state district judge at the time his remarks were written and a judge on the Court of Criminal Appeals since January 1, 1967. The commentaries are as follows:

by Hon. W. A. Morrison:

"It is now the holding of the Supreme Court of the United States and of the Court of Criminal Appeals that a complaint which may be used to secure a warrant of arrest or search must be based on personal knowledge or recite the facts upon which the affiant bases his belief that an offcnse has been or is being committed. Giordenello v. U.S., 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503; Aguilar v. Texas, 84 S.Ct. 1509, 378 U.S. 108, 12 L.Ed. 2d 723; Barnes v. Texas, 380 U.S. 253, 85 S.Ct. 942, 13 L.Ed.2d 808; and Barnes v. State, 390 S.W. 2d 266. See Arts. 18.01 to 18.09."

by Hon. John F. Onion, Jr.

"This article dealing with the requisites of the affidavit or complaint for a warrant of arrest has not been changed, but should be read in the light of Barnes v. Texas, 390 S.W.2d 266, which case was reversed by the United States Supreme Court, 85 S.Ct., 942, 380 U.S. 253, 13 L.Ed.2d 818, in light of Aguilar v. Texas, 84 S.Ct. 1509, 378 U.S. 108, 12 L.Ed.2d 723; and Giordenello v. United States, 78 S.Ct. 1245, 357 U.S. 480, 2 L.Ed.2d 1503. It

would appear from the Barnes decision that the complaint must set forth a sufficient basis upon which an independent finding of probable cause can be made by the magistrate before the issuance of an arrest warrant. . . ."

It seems clear that Article 15.05 as interpreted subsequent to *Barnes v. Texas,* supra, requires a showing of probable cause, as measured by federal standards, in any complaint upon which a warrant of arrest is issued. Accordingly, the statute is not repugnant to the United States Constitution.

As indicated above, the sole question here is whether the particular warrant under which Appellant was arrested was issued upon probable cause. This issue does not present a proper subject for review by this Court by an Appeal from a state court.

It is respectfully submitted that the Appellant presents no substantial question for review by this Court and that this Appeal should be dismissed or the judgment below should be affirmed.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas

GEORGE M. COWDEN
First Assistant Attorney General

A. J. CARUBBI, JR.
Staff Legal Assistant

R. L. (BOB) LATTIMORE
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HOWARD M. FENDER
Assistant Attorney General

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Assistant Attorney General

LONNY F. ZWIENER
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Austin, Texas 78711

CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of the State of Texas, one of the Attorneys for Appellee, do hereby certify that a copy of the foregoing Motion to Dismiss or Affirm has been served upon Mr. W. C. Wiebusch, Attorney for Appellant, by depositing same in the United States Mail, Certified, Postage Prepaid, addressed to Mr. Wiebusch at 409 Scanlan Building, 405 Main Street, Houston, Texas, this the 14th day of April, 1967.

LONNY F. ZWIENER
Assistant Attorney General

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

GREENE *v.* TEXAS.

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 1199. Decided May 22, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.